(13)

No. 96-827

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

LEONARD ROLLON CRAWFORD-EL,

Petitioner,

v.

PATRICIA BRITTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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November 10, 1997

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REPLY BRIEF FOR THE PETITIONER

I. RESPONDENT AND THE OPPOSING AMICI OVERLOOK *MT. HEALTHY BD. OF EDUC. v. DOYLE*

Britton and the opposing amici overlook that, even where evidence shows a defendant's conduct was substantially motivated by unconstitutional intent, the defendant still may obtain summary judgment by demonstrating that the same action would have been taken for a legitimate reason. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). As our opening brief noted, at 17, this Court already has recognized that "fending off baseless First Amendment lawsuits [on this ground] should not consume scarce government resources." *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S. Ct. 2353 (1996). Neither Britton nor any amicus rebuts this point.

Britton, herself, acknowledges that First Amendment retaliation claims should not be foreclosed "merely because the public official is able to articulate an objectively reasonable basis for her conduct." Resp. Br. at 22. Britton offers no objection to a requirement for an actual showing on this issue. Nor does the United States object to a requirement that an official seeking summary judgment "show that there was an objectively legitimate reason" for the challenged conduct. U.S. Br. at 19. Under *Mt. Healthy*, even a defendant who admits to having been substantially motivated by unconstitutional animus may obtain summary judgment by demonstrating that the same action would have been taken for "an objectively legitimate reason." Neither Britton nor any amicus suggests a reason why this doctrine is insufficient to protect qualified immunity.[1]

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[1] Britton never has claimed entitlement to summary judgment under *Mt. Healthy*, nor does the evidence support summary judgment in her favor. Britton says that in July she ordered the seizure of all D.C. prisoners' property in Washington State, including Crawford-El's, so

II. NEITHER RESPONDENT NOR ANY AMICUS IDENTIFIES ANY DEFICIENCY IN THE DISCOVERY OR SUMMARY JUDGMENT RULES

Both Britton and the United States argue that where qualified immunity is raised by a summary judgment motion the plaintiff should not be entitled to discovery without showing a reasonable likelihood that it will "uncover sufficient evidence to support a jury finding in the plaintiff's favor." U.S. Br. at 11; Resp. Br. at 27-28. Our opening brief at 17, however, showed that this is precisely what current law requires. Neither Britton nor any amicus has pointed to any deficiency in our specific demonstration that firm application of the civil rules is more than adequate to dispose of insubstantial claims without trial or burdensome discovery. *See* Pet. Br. at 17-18.

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that it would not become lost. She says that she refused to deliver Crawford-El's property to him in September because she believed prisoners going to federal facilities were not allowed to have any property. Assuming the initial seizure could be shown to be objectively reasonable, she has not made such a showing. And even if this point could be debated, Britton's asserted belief that federal prisoners cannot have any property was both wrong, Pet. App. 187a-188a, and not objectively reasonable. Under clearly established law, prisoners have a constitutional right to possess legal papers needed for pursuit of redress. *See* Pet. App. 153a. Admissible evidence shows that Britton knew Crawford-El's property included such papers. Pet. App. 182a. Evidence also shows that other prisoners obtained return of property Britton had ordered seized, while Crawford-El and others who had told Britton of their need to obtain their legal papers, or who had filed claim notices over Britton's videotaping of them while shackled, were denied their property. Pet. App. 184a-187a. A jury reasonably could conclude that Britton seized the prisoners' property in order to control its disposition, not to prevent its loss, that her decisions as to timing and type of disposition were substantially motivated by her hostility to "legal troublemakers," and that she has failed to demonstrate that she would have made the same decisions in the absence of this motivation.

The United States erroneously argues that plaintiffs can defeat summary judgment merely by presenting evidence supporting "weak" inferences. U.S. Br. at 18. To the contrary, plaintiffs can defeat summary judgment only if the inferences they draw from their evidence are reasonable and justifiable. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The United States also complains that any one of three types of evidence ("a prior run-in, an intemperate remark, or another superficially similar case that had been treated differently") could preclude summary judgment, "regardless of how unfounded the allegations of impermissible motive" might be. U.S. Br. at 24. The government, however, cites no authority for this proposition. Petitioner is aware of none. Established law answers the government's point. If the evidence on summary judgment does not support a justifiable inference of liability, then the defendant is entitled to prevail. If the evidence does support such an inference, however, then the plaintiff's allegations cannot be said to be "unfounded." Significantly, the United States presents no argument that the evidence here is insufficient to support a finding that Britton acted with unconstitutional intent.[2]

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[2] Britton's review of the evidence, moreover, Resp. Br. at 30-31, is inaccurate. Contrary to her assertions, the evidence shows that she withheld the property of other prisoners who fall in the "general class" of "legal troublemaker." See n. 1, *supra*. She did not treat similarly all other prisoners. *Id*. With respect to her hostile vow "to do everything ... to make it as hard for [Crawford-El] as possible," and to do so "so long as [he] was incarcerated," a jury hearing the evidence properly could infer that the critical content of the prominent newspaper article, including Crawford-El's remarks, had engendered Britton's desire for vengeance and that if no article had appeared (or if it had extolled the virtues of her administration), Britton would not have felt embarrassed in front of her coworkers and would not have cared one whit about the visitor pass which the reporters had used to enter the prison.

II. NEITHER RESPONDENT NOR ANY AMICUS IDENTIFIES ANY OTHER VALID REASON FOR CHANGING THE NORMAL BURDEN OF PROOF

The United States asserts that, since criminal defendants must prove the defense of selective prosecution by clear evidence, civil plaintiffs who are innocent of wrongdoing, who have been injured by a government official, and who claim that the injury was unconstitutionally-motivated, should be required to meet the same burden. U.S. Br. at 21. To state this argument is to reject it. The interests at stake in a criminal prosecution are not comparable to those at issue in a civil First Amendment retaliation case. Nor are the interests involved here comparable to those at issue in the other types of cases cited by Britton and the United States. Resp. Br. at 33; U.S. Br. at 20.

Both Britton and the opposing amici fail to address several important interests that are at stake. None mentions the deleterious consequences that their "clear and convincing" evidence proposal would have for (1) race discrimination claims, (2) claims concerning politically-motivated covert destruction of lawful political organizations, or (3) claims that officials ruined government employees' careers in retaliation for their off-duty speeches on matters of public concern. *See* Pet. Br. at 20-21. Britton's brief avoids confronting these consequences by blithely advancing the self-contradictory assertion that "[t]he clear and convincing standard" allows claims "that are supported by substantial evidence to proceed." Resp. Br. at 25. Obviously, the clear and convincing standard would allow only claims supported by clear and convincing evidence to proceed. The standard would defeat other meritorious claims.

Nothing in Britton's brief, the brief for the United States, let alone anything in the far more general briefs of the other opposing amici, warrants the drastic change in law which the clear and convincing evidence standard would bring about.

CONCLUSION

The Court should hold that qualified immunity does not alter a plaintiff's burden of proof in First Amendment retaliation cases. The Court should embrace the opinion of Chief Judge Edwards and remand the case for further proceedings.

Respectfully submitted,

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